

The Legal "Posture" of Resistance to American Intervention in Vietnam

Many people, even some of those who have engaged most actively in "civil disobedience" continue to have a defensive, apologetic attitude towards violation of the Selective Service Act and other war-supporting laws. Thus, some of those who give active support to draft-resisters speak of "joining in a conspiracy" with them and some draft resisters speak of "filling the jails" -- as if imprisonment were an inevitable result of resistance. Such attitudes not only weaken our effectiveness, but are quite unnecessary.

A "conspiracy" is an agreement among two or more people to do an unlawful act. It is the American intervention in Vietnam which is unlawful, not the resistance to it. This intervention clearly violates basic provisions of the United Nations Charter, other important international laws and treaties, and the U.S. Constitution itself. Where a subsidiary law -- whether it be a local racial segregation ordinance or an act of Congress like the Selective Service Act -- is clearly in conflict with a higher law, the subsidiary law is itself null and void and legally unenforceable. It is those who try to enforce such an illegal law who are engaged in conspiracy.

It is true that the Supreme Court has so far refused to rule on the legality of U.S. intervention in Vietnam. But if the Johnson Administration actually believed this war to be legal, even under our own laws, it would long ago have used every means to press this issue to a judicial decision, instead of trying in every way to prevent such a test.

Many people feel that American intervention in Vietnam reflects a rather basic tendency of American society and foreign policy, and that the Supreme Court would therefore never rule against it. But it is clear to those who have any historical insight or breadth of vision that in the atomic age this tendency may well be suicidal, not only for America as a nation but for our present form of society. Such a realization tends to create profound differences of opinion among those who are in positions of power and authority -- much like the differences which were generated by the growth of labor unionism in the 1930's. Therefore, since it can be assumed that the Supreme Court tends to reflect the underlying opinions in the business community and other powerful and influential sections of the American public, it is not at all inconceivable that there will come a point in the rather near future when the majority of the Supreme Court will come to the conclusion that further escalation of this war would be disastrous for the U.S., and that this conviction will give them the courage to actually rule the war illegal -- and to tell the government that it has no legal right to draft either men or money to support it.

It is also sometimes argued that the issue of legality is irrelevant in a practical sense because the Supreme Court has no real power to enforce such a decision and the administration could simply ignore it. This overlooks an important factor. Quite aside from the blow which such a ruling would strike at the moralistic rationalizations for the intervention, the administration needs the services of the judicial branch to enforce the draft law. Any attempt to enforce it by extra-legal military means would amount to an overthrow of our whole system of government and would be quite inconceivable under present circumstances.

Therefore, it is important that the peace movement, including those who resist the draft or engage in other non-violent resistance, adopt a posture which clearly reflects the fact that it is we in the peace movement who are upholding the law and the Johnson Administration which is engaging in the illegal conspiracy --

a conspiracy which is subverting not only the structure of international law and America's international honor, but the structure of our own society and even of our physical security. Let us not talk of "joining a conspiracy" to resist; let us talk of joining the resistance to end the military conspiracy.

It is quite true that until the Supreme Court rules the Vietnam intervention to be illegal, those who violate the provisions of the Selective Service Act and other war-supporting laws will be subject to possible prosecution and imprisonment for up to five years. Although merely advocating draft resistance is still apparently considered to come under the protection of the first amendment, this also may someday become subject to prosecution. But when the number of resisters increases sufficiently, the government will find it politically impossible to imprison them all!

To educate the public regarding the basic issues, to facilitate the growth of resistance, and to lay the strongest basis for whatever legal action becomes necessary, it is of the utmost importance to emphasize -- in our public statements, leaflets, and legal briefs, the basic fact that it is the war itself which is illegal and those who oppose it who are upholding legality.